83-259

No. _____

Office - Supreme Court, U.S.
FILED
AUG 17 1983
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EASTERN AIR LINES, INC.,
Petitioner,

vs.

ATLANTIC RICHFIELD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTIONS PRESENTED

I.

Should prejudgment interest be awarded to a successful private plaintiff under federal common law in an action for overcharges under the Emergency Petroleum Allocation Act of 1973?

II.

In an action where a private plaintiff has proved that a refiner overcharged consumers $26.9 million, is that plaintiff's recovery properly limited to $179,160 by assuming a full refund of the entire overcharges to all affected customers when in fact no such refund has occurred or been ordered?

ADDITIONAL PARTIES

Two sets of *amici curiae* filed briefs in the appeal and both addressed the first question presented:

I. Ashland Oil Company of California
Independent Oil and Tire Co.
Shepherd Brothers Service Stations
U. S. Oil Company, Inc.

II. Richard W. Dyke, dba Western Stations Co.
Calvin Oil Company
F. O. Fletcher, Inc., dba Fletcher Oil Company

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EASTERN AIR LINES, INC.,
Petitioner,

vs.

ATLANTIC RICHFIELD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Eastern Air Lines, Inc., respectfully petitions for a writ of certiorari to the Temporary Emergency Court of Appeals of the United States.

REPORTS

The opinion of the Temporary Emergency Court of Appeals is not yet officially reported, but it is unofficially reported at 4 Energy Mgmt. (CCH) ¶26,431. The slip opinion is included in the appendix. A. 1. The order of the District Court that was affirmed is unofficially reported at 4 Energy Mgmt. (CCH) ¶26,419. It has been included in the appendix. A. 25. A May 1, 1981 Memorandum, Opinion and Order granting partial summary judgment

to Eastern is unofficially reported at 4 Energy Mgmt. (CCH) ¶26,300. The January 12, 1982 Memorandum of Decision vacating the May 1, 1981 Order is unofficially reported at 4 Energy Mgmt. (CCH) ¶26,374.

JURISDICTION

The decision of the Temporary Emergency Court of Appeals was rendered and entered on June 15, 1983. Both parties' timely petitions for rehearing were denied on July 18, 1983, and the order was entered on the same day. A. 23.

This Court's jurisdiction is invoked pursuant to Section 211(g) of the Economic Stabilization Act (12 U.S.C. § 1904 note), as amended, and as incorporated into the Emergency Petroleum Allocation Act of 1973, Section 5(a), 15 U.S.C. § 754(a), which provides: "Within 30 days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for writ of certiorari may be filed in the Supreme Court of the United States."

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

The case arises under the Emergency Petroleum Allocation Act of 1973 ("EPAA"), Pub. L. No. 93-159, 87 Stat. 627, 15 U.S.C. § 751 *et seq.* A. 116. It is brought pursuant to Section 210 of the Economic Stabilization Act ("ESA"), as amended, Pub. L. No. 92-210, 85 Stat. 743 (1971), 12 U.S.C. § 1904 note. A. 113. The case involves issues arising under the Petroleum Price and Allocation Regulations, 10 C.F.R. part 212, as promulgated at 39 Fed. Reg. 1924 (Jan. 15, 1974), and as amended from time to time. Pertinent portions of the regulations are set out in the District Court opinion. A. 47-48.

STATEMENT OF THE CASE

Eastern Air Lines, Inc. ("Eastern") was required to abandon its contract jet fuel suppliers and revert to its 1972 supplier, Atlantic Richfield Company, on November 1, 1973 at Chicago and Dallas pursuant to the Middle Distillate Fuel Allocation Program, 38 Fed. Reg. 28660 (Oct. 16, 1973). Under that program, Eastern was required to purchase its jet fuel at those locations from Atlantic Richfield. The quantity was limited by the Federal Energy Office and Atlantic Richfield's prices were governed by the Petroleum Price Regulations.

Eastern purchased in excess of twenty-two million gallons of jet fuel from Atlantic Richfield before being allowed to revert to its contract suppliers on January 13, 1974 in Dallas and on October 25, 1974 in Chicago.

On September 12, 1974, Eastern filed a suit in the United States District Court for the Southern District of Florida to recover alleged overcharges on its mandated purchases pursuant to Section 5(a) of the Emergency Petroleum Allocation Act, 15 U.S.C. § 754(a) and Sections 210 and 211 of the Economic Stabilization Act, 12 U.S.C. § 1904 note. Section 211(a) vests exclusive original jurisdiction in the district courts over controversies arising under the EPAA. Section 211(b)(2) vests exclusive appellate jurisdiction over all such controversies in the Temporary Emergency Court of Appeals (TECA).

On May 1, 1981, the Court entered partial summary judgment on Eastern's behalf on three regulatory issues, awarding Eastern $2,967,682 in overcharges, plus prejudgment interest. That judgment was later vacated by a successor judge, and a trial held from February 16 through February 22, 1982. A. 3-4.

The final judgment was adverse to Eastern on two of the three regulatory issues on which the Court had previously ruled in Eastern's favor. Those issues are not raised in this petition. The final judgment was consistent with the earlier summary judgment on the third issue to the extent that both held that for the period October 1973 through October 1974 Atlantic Richfield overcharged purchasers of a broad category of refined products, including jet fuel, $26.9 million. A. 80. However, Eastern's share of those overcharges was reduced from $946,108, as previously calculated and found on summary judgment, to $179,160. A. 78, A. 82. The lesser amount approximated what would have been Eastern's share of the total overcharges had the entire $26.9 million been refunded to all affected purchasers. A. 13. As Atlantic Richfield had never refunded that amount, Eastern contends it was overcharged $946,108 under the price regulations' monthly approach to price calculation.

The District Court denied Eastern treble damages and attorneys' fees under ESA § 210, holding that multiple damages and attorneys' fees could only be imposed for criminally willful overcharges. A. 84. The District Court also denied Eastern's claim for prejudgment interest, holding it was not allowed under the statute, and even if it were, it would not be appropriate because the sums due Eastern were "uncertain." A. 111-12.

Both parties appealed to the Temporary Emergency Court of Appeals, which affirmed the District Court in all respects. A. 22.[1] That Court subsequently denied both

[1] TECA invoked *Fed. R. Civ. P.* 52(a) in affirming the denial of treble damages and attorneys' fees. A. 17. The Court, in dicta, apparently did not fully endorse the willfulness standard used by the District Court. Although Eastern believes it was entitled to treble damages and attorneys' fees, it does not seek certiorari on those issues. A. 21.

parties' timely petitions for rehearing and suggestions for rehearing *en banc*. A. 23.

REASONS FOR GRANTING THE WRIT

I.

PREJUDGMENT INTEREST UNDER FEDERAL REMEDIAL STATUTES IS A CONFUSED ISSUE REQUIRING CLARIFICATION BY THIS COURT

A. The Lower Courts' Failure to Award Prejudgment Interest on Overcharges Impedes Congressional Purposes, Is Contradictory to the Law for Government Enforcement and Is Inequitable.

The Temporary Emergency Court of Appeals affirmed the denial by the trial court of prejudgment interest on overcharges that occurred in 1973 and 1974. That decision, made with scant discussion and less analysis, undermines the effectiveness of national policy as expressed in the private-plaintiff statute of the Emergency Petroleum Allocation Act ("EPAA"). Moreover, the decision is a misapplication of the federal common law, and is in conflict with the great weight of the case law from the Circuit Courts of Appeals. That case law is inconsistent and confusing, evidencing that a need for guidelines exists on the question of prejudgment interest, not only with regard to the EPAA, but also with regard to federal remedial statutes in general.

The private-plaintiff statute incorporated into the comprehensive petroleum price and allocation program contemplated by the EPAA recognizes the need for private enforcement as a supplement to government enforcement. The EPAA private plaintiff has been likened to the private plaintiff under antitrust and securities laws. *See Bulzan v. Atlantic Richfield Co.*, 620 F.2d 278, 282 (TECA

1980). However, the treble damage provision of the ESA is discretionary, and treble damages were not awarded in this case. Nor were Eastern's attorneys' fees. The amount that was awarded was overcharges, defined in ESA § 210(c) as the amount by which the amount Eastern paid during its mandatory relationship with Atlantic Richfield exceeded the maximum amount allowed by law. Thus, Atlantic Richfield charged illegal prices nine years ago, and has been unjustly enriched at Eastern's expense by keeping that money for nine years.[2]

That result hardly provides an incentive for private enforcement of national policy or a deterrent to wrongdoing. Instead, it provides an incentive to those regulated to break the law and thereby obtain interest-free loans. *See Illinois Central Railroad v. Texas Eastern Transmission Corp.*, 551 F.2d 943, 945 (5th Cir. 1977).

The decision below has also created an inexplicable dichotomy between government enforcement and private enforcement. The Department of Energy has no express statutory authority for the award of prejudgment interest in administrative enforcement actions.[3] Nevertheless, TECA has upheld two awards of prejudgment interest in government overcharge actions where the ultimate beneficiary would be those overcharged. *Sauder v. De-*

[2] The result is at odds with other district court cases involving the price regulations. In *Dyke v. Gulf Oil Corp.*, Civil No. 77-10 PA (D. Ore. Apr. 15, 1982) (interim order), the Court awarded prejudgment interest on overcharges at the rate used by the Department of Energy in administrative enforcement actions. That rate changes quarterly and reflects the cost of short-term borrowing. 46 Fed. Reg. 21412 (Apr. 10, 1981). Likewise, in *United States v. Exxon Corp.*, 561 F. Supp. 816, 857-58 (D.D.C. 1983), the Court ordered prejudgment interest on regulatory violations of $895,501,163.85 at the DOE rate. Eastern sought interest at that rate below, but the issue was not reached.

[3] ESA § 210(a) does authorize the court to award "appropriate relief" in a private action.

partment of Energy, [1974-80 Transfer Binder] Energy Mgmt. (CCH) ¶ 26,157 (D. Kan. 1979), *aff'd*, 648 F.2d 1341 (TECA 1981); *Bonray Oil Co. v. Department of Energy*, 472 F.Supp. 899, 904 (W.D. Okla. 1978), *aff'd per curiam*, 601 F.2d 1191 (TECA 1979). Both cases focused on the remedial purpose of the ESA and the need to make whole those injured by overcharges. *Accord*, *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717, 721-22 (TECA), *cert. denied*, 103 S.Ct. 172 (1982).

No sound rationale or legal principle allows a different result between cases brought by the government for the benefit of persons overcharged and cases brought by the victims themselves. The result threatens the effectiveness of the private action as a vital means of enforcing the policy of the EPAA, and is at cross-purposes with Congressional purpose in providing private remedies. *See Ashland Oil Co. v. Union Oil Co.*, 567 F.2d 984, 989-90 (TECA 1977), *cert. denied*, 435 U.S. 994 (1978). *Cf. Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

There are many private-plaintiff cases still pending in the courts, as well as hundreds of government enforcement actions. The principle that a private plaintiff would be denied treble damages, attorneys' fees and prejudgment interest portends serious consequences for those ongoing enforcement actions.[4]

B. The Federal Common Law Is Murky on Prejudgment Interest Under Federal Statutes.

In *Rodgers v. United States*, 332 U.S. 371 (1947), this Court examined the question of whether or not interest was due on amounts past due under the Agricultural

[4] Price controls were lifted on January 30, 1981, Executive Order 12287, 46 Fed. Reg. 9909 (1981).

Adjustment Act of 1938 as a matter of federal common law. Finding none was due because the principal amount was a penalty, the Court promulgated a two-part test for determining whether prejudgment interest would be due on obligations arising under federal statutes:

1. appraisal of the Congressional purpose in imposing the statutory obligations; and
2. the relative equity between the beneficiaries of the obligations and those upon whom they were imposed.

332 U.S. at 373.

The holding of *Rodgers* that the award of prejudgment interest is a matter of federal law has been consistently adhered to by the courts with the notable exception of the Court below. That concept, which predates *Rodgers*, was ignored by the Court below which cited, as did the District Court, only *Belcher v. Birmingham Trust National Bank*, 488 F.2d 474 (5th Cir. 1973), in denying prejudgment interest. A. 17, A. 112. *Belcher* is a diversity case construing Alabama law, which requires liquidation of a claim as a prerequisite to prejudgment interest.[5] Thus, the Court below is at odds with this Court and the great weight of other authority. In fact, the Court's reliance on a case construing state law in a federal question case appears to be unique among the Courts of Appeals of the United States, in addition to being totally out of line with precedent from this Court.

However, those courts that have addressed the question of prejudgment interest under federal statutes as a matter

[5] This Court held that the liquidation *vel non* of a claim was irrelevant fifty years ago, noting " 'The disinclination to allow interest on claim of uncertain amount seems based on practice rather than theoretical grounds.' Williston on Contracts, Vol. 3, §1413." *Funkhouser v. J. B. Preston Co.*, 290 U.S. 163, 169 (1933).

of federal common law have reached varying results in similar, if not identical, situations. The various tests that have emerged in appellate decisions are remarkable mainly for their lack of consistency. The following factors have all played a role in the several courts' determination of the federal common law absent express Congressional guidance:

1. Whether the obligor is the United States or a private party. *Compare Sauder v. Department of Energy*, [1974-80 Transfer Binder] Energy Mgmt. (CCH) ¶ 26,157 (D.Kan. 1979) *with Eastern Air Lines, Inc. v. Atlantic Richfield Co.*, 4 Energy Mgmt. (CCH) ¶ 26,431 (TECA 1983).

2. Whether the amount is liquidated or unliquidated. *Compare Robinson v. Watts Detective Agency, Inc.*, 685 F.2d 729, 741 (1st Cir. 1982) (Bankruptcy Act, obligation unliquidated, no interest) *cert. denied*, 103 S.Ct. 728 (1983) and 103 S.Ct. 1191 (1983), *with West v. Harris*, 573 F.2d 873, 882 (5th Cir. 1978) (National Flood Insurance Act, liquidation not required, interest awarded), *cert. denied*, 440 U.S. 946 (1979).

3. Whether the obligation is a penalty or compensatory. *Illinois Central Railroad v. Texas Eastern Transmission Corp.*, 551 F.2d 943, 944 (5th Cir. 1977); *Hodgson v. American Can Co.*, 440 F.2d 916, 922 (8th Cir. 1971).

4. Whether there was a need to make the injured party whole. *See West v. Harris*, 573 F.2d at 882.

5. Whether an award would prevent unjust enrichment. *Shell Oil Co. v. FERC*, 664 F.2d 79, 83-84 (5th Cir. 1981); *Pan American Petroleum Corp. v. Federal*

Power Commission, 376 F.2d 161, 171 (10th Cir. 1967), *vacated on other grounds*, 391 U.S. 363 (1968).

6. Whether other compensation is awarded such as statutory liquidated damages or treble damages. *Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 80 (2d Cir. 1971), *rev'd on other grounds sub nom. Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973).

7. Whether the "general equities" required prejudgment interest. *Clark v. E. J. Lavino & Co.*, 175 F.2d 897, 899-900 (3d Cir. 1949). *Accord, Rodgers v. United States*, 332 U.S. at 373.

8. Whether an award was consistent with the intent of Congress as found in legislative history. *Hodgson v. Wheaton Glass Co.*, 446 F.2d 527, 534-35 (3d Cir. 1971).

As more statutes have created new rights and obligations over the years, the overlay of those statutes on the variables listed above has created an almost indecipherable body of federal common law. As the common law on prejudgment interest has become more confusing, the issue has become more important. Inflation has increased the incentive to hold money, while the complexity, number and duration of suits under federal statutes have increased.[6]

The importance of the prejudgment interest issue notwithstanding, irreconcilable results in the lower courts abound. In this case, the District Court awarded prejudgment interest on $2,967,682.00 in overcharges in a

[6] This Court recently upheld a prejudgment interest award of $11,022,854.97 on royalties of $8,813,945.50 under 35 U.S.C. § 284 in a patent infringement case. *General Motors Corp. v. Devex Corp.*, 103 S.Ct. 2058, 2060 (1983). That case, like this one, was protracted, and demonstrated the importance of prejudgment interest as a means of providing adequate compensation.

partial summary judgment order. *Eastern Air Lines, Inc. v. Atlantic Richfield Co.*, 4 Energy Mgmt. (CCH) ¶ 26,300 (S.D. Fla. 1981) (Hastings, J.), *vacated*, 4 Energy Mgmt. (CCH) ¶ 26,374 (S.D. Fla. 1982) (Mishler, J.), *aff'd*, 4 Energy Mgmt. (CCH) ¶ 26,431 (TECA 1983). However, the final judgment, also for overcharges, denied prejudgment interest. A. 92. Thus, in the same case, the same court reached irreconcilable results.

Similar inconsistent results are apparent within and among the various circuits. For example, in *American Timber & Trading Co. v. First National Bank of Oregon*, 690 F.2d 781, 784 (9th Cir. 1982), prejudgment interest under the Bank Act was denied. But in *First Empire Bank-New York v. FDIC*, 634 F.2d 1222, 1224-25 (9th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981), it was awarded. In *Robinson v. Watts Detective Agency*, 685 F.2d 729, 741-42 (1st Cir. 1982), the court, applying "federal common law," held no prejudgment interest was due on a claim under the Bankruptcy Act, basing its holding in part on the fact that the claim was unliquidated. In *Pan American Petroleum Corp. v. Federal Power Commission*, 376 F.2d 161, 171 (10th Cir. 1967), an argument that a claim must be liquidated for prejudgment interest to be awarded was expressly rejected. In *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1219 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981) and 454 U.S. 1084 (1981), the court held that prejudgment interest was required on claims under ERISA. But in *Bricklayers' Pension Trust Fund v. Taiariol*, 671 F.2d 988, 990 (6th Cir. 1982), the court held award of prejudgment interest under ERISA and the LMRA was discretionary.

Although confusion remains, the emerging rule appears to be that when an award under a federal statute is pri-

marily compensatory, the award of prejudgment interest is required to make the injured party whole. Thus, the decision below is directly at odds with a majority of the circuits.[7]

Although certain rules on prejudgment interest predominate, there is still confusion apparent from the reported decisions. It has been thirty-six years since *Rodgers*, and there is compelling need for clear guidance on this subject of prejudgment interest as a matter of federal common law. That need is best exemplified by the decision by the Courts below in this case.

II.

THE TEMPORARY EMERGENCY COURT OF APPEALS FAILED TO ENFORCE THE PETROLEUM PRICE REGULATIONS AND LAWS

A. **Ruling of the Courts Below.**

The District Court, on three occasions, and TECA found that for the period from October 1973 through October 1974, Atlantic Richfield recovered $26.9 million more on the sale of "other covered products" than the

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[7] *Clinchfield Coal Co. v. Cox*, 611 F.2d 47, 48 (4th Cir. 1979) (benefits under Title VI of the Federal Coal Mine Health and Safety Act of 1969); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1219 (8th Cir. 1981) (ERISA claim); *Pan American Petroleum Corp. v. Federal Power Commission*, 376 F.2d 161, 171 (10th Cir. 1967) (refunds under Natural Gas Act); *Phillip Carey Mfg. Co. v. N.L.R.B.*, 331 F.2d 720, 729-31 (6th Cir. 1964) (NLRA), *cert. denied*, 279 U.S. 888 (1964); *West v. Harris*, 573 F.2d 873, 882-83 (5th Cir. 1978) (National Flood Insurance Act of 1968); *McClanahan v. Mathews*, 440 F.2d 320, 324-26 (6th Cir. 1971) (Fair Labor Standards Act of 1938); *Hodgson v. American Can Co.*, 440 F.2d 916, 921-22 (8th Cir. 1971) (Fair Labor Standards Act).

regulations allowed.[8] Of that amount, Eastern was awarded $179,160. A. 82. Under the regulations, Eastern was overcharged $946,108.

Under the price regulations, prices were required to be determined monthly. In arriving at $179,160 as Eastern's share of the overcharges, the District Court putatively adopted a "monthly" approach in determining overcharges. A. 81-82. However, in so doing, the Court adopted a convention that presumed that Atlantic Richfield refunded the entire $26.9 million to all affected customers. That presumption worked to Eastern's detriment, was contrary to fact, and flew in the face of the regulations. It also provided an extraordinary windfall to Atlantic Richfield for its unlawful prices.

The price regulations pegged monthly price increases to consumers to a refiner's increased costs. A. 34, A. 7-8. If a refiner did not recover all his increased costs through increased prices in a particular month, he was allowed to carry those costs over for recovery through increased prices in subsequent months. The same regulatory mechanism applied if a refiner recovered more money through increased prices than he had incurred in increased costs. In other words, he was required to carry forward his overrecovery for use in calculating ceiling prices in subsequent months. A refiner could avoid the responsibility for carrying his overrecoveries into subsequent months by refunding the amount to affected purchasers and thus eliminating his overrecovery.

Atlantic Richfield never refunded any of the $26.9 million in overrecovery, contending it had a right to off-

[8] Other covered products were generally all products, including jet fuel, except motor gasoline and middle distillates (diesel fuel and home heating oil), which were accorded separate treatment under the price regulations. A. 34.

set those overcharges to purchasers of other covered products against undercharges on gasoline and middle distillates. A. 10-11. The District Court correctly held it did not have that right, and TECA agreed. A. 70, A. 12.

However, in translating gross overcharges into Eastern's overcharges, the District Court departed drastically from the regulatory scheme. When an overrecovery occurred in a particular month, the Court awarded Eastern its volumetric share for that month. However, the Court did not carry the remaining overrecovery forward to use in subsequent monthly price calculations. Millions of dollars in overcharges thus disappeared as though they had been refunded to the affected purchasers, when in fact they remained in Atlantic Richfield's pocket. Of the $26.9 million in overcharges proved, Eastern received $179,160 (with no interest) and Atlantic Richfield kept the rest. A. 13. More importantly, the result was reached only by disregarding the regulations.

The regulatory approach, urged by Eastern and embraced by the District Court in its May 1, 1981 Order, later vacated by a successor judge, resulted in overcharges to Eastern of $946,108, which amount Atlantic Richfield could, under the regulatory scheme, deduct from future obligations for its overcharges should any obligations arise. Although the higher award would still leave Atlantic Richfield with the bulk of its illegal profits, it would comply with the administrative scheme, and more correctly reflect the overcharges suffered by Eastern.

TECA badly misconstrued Eastern's argument on the issue as it strained to support the holding of the District Court. The Court said:

> Eastern concedes that had ARCO made a refund of the overcharges resulting from the eventual disallow-

> ance of the retroactive reallocation of costs *at the time* the overcharges occurred, ARCO would only have had to refund $179,160. However, Eastern asserts, since the refund for overcharges is being made considerably after the fact, ARCO should now refund $946,108. . . .

A. 13.

That is a gross misstatement. If Atlantic Richfield refunded the entire $26.9 million *at any time*, Eastern would be limited to $179,160, its aliquot portion. However, as a refund has *never* been made, Eastern is entitled to its monthly aliquot portion, as computed under the regulations. TECA's misstatement reflects a fundamental misconception by TECA as to the law, which affects potentially billions of dollars of overcharges.

B. The Holding Below Eviscerates the Private-Plaintiff Role.

The Court's unjustified mitigation of the damages paid by a violator of the price regulations discourages private enforcement of the price regulations in furtherance of national objectives. This Court has recognized that private plaintiffs play an important role in numerous and diverse federal programs.[9] That role is no less important in the area of petroleum allocation and price controls. S. Rep. No. 92-507, 92d Cong., 1st Sess., *reprinted in* 1971 U.S. Code Cong. & Ad. News 2283, 2291. In passing emergency legislation to deal with a national crisis,

[9] *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982) (Commodities Exchange Act); *Cannon v. University of Chicago*, 441 U.S. 677, 705-08 (1979) (Title IX, Education Amendments of 1972); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (Civil Rights Act); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 263 (1975) (environmental laws); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969) (Clayton Act).

Congress recognized that the government's resources would be inadequate for proper enforcement. H.R. Rep. No. 93-531, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2582, 2583. Congress was likewise cognizant that there would be victims requiring a means of protecting their rights in the drastic economic upheaval that would follow enactment of the EPAA and its implementing regulations. Conf. Rep. 93-628, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2688, 2702.

The results of private enforcement have been dismal, despite clear indications that many billions of dollars of violations occurred. Hearings Before Subcommittee on Oversight and Investigations of the House Energy Committee, May 23, 1983 (Comments of Rayburn Hanzlik, Administrator, Economic Regulatory Administration). Ten years after implementation of price controls, this case is the first action by a purchaser of refined petroleum products to result in the award of damages after appeal to TECA. Yet, in this case, Eastern received less than one cent per gallon recovery, without interest, even though Eastern spent nine costly years in litigation [10] resulting in a finding that Atlantic Richfield had overcharged customers $26.9 million in a one year period. Although the result itself may not be grounds for this Court to grant a writ of certiorari, the Court below's clear message of leniency embodied in that result is sufficient reason for this Court's review. By ignoring the regulations and calculating damages as though Atlantic Richfield was refunding the entire amount of its overcharges, the trial

[10] Eastern stood ready to prove $750,000 in attorneys' fees and expenses in the trial court.

court and TECA granted amnesty for Atlantic Richfield's multimillion dollar violations. As the appellate court has exclusive jurisdiction over cases arising under the EPAA, that amnesty bodes ill for the entire enforcement program, both the governmental and private aspects.

At trial, testimony by Atlantic Richfield executives indicated an attitude of tolerating federal regulation of petroleum products in anticipation of its quick demise. Although the regulations were not rescinded until 1981, Executive Order 12287, 46 Fed. Reg. 9909 (1981), the national progress on enforcement has been hindered in general by the same stonewalling technique, with violations alleged in government administrative proceedings in the middle 1970's just recently being considered by the district courts. *See, e.g., Mid-Continent, Inc. v. Edwards*, 4 Energy Mgmt. (CCH) ¶26,416 (E.D. Ark. 1982). Congress, however, continues to adequately fund the Department of Energy enforcement effort. H.R. 3363 (Dept. of Interior Appropriations Bill), 98th Cong., 1st Sess. (1983). TECA's leniency toward Atlantic Richfield, at the expense of Eastern, contradicts the continuing vigor of Congress, the Executive and private plaintiffs in enforcing the now expired regulations. The Court has sent a clear message to the oil industry that violations involving billions of dollars will be gently treated once cases involving those regulations reach the specialized court created to cope with the national economic crisis of scarce petroleum.

This Court has repeatedly emphasized the importance of private plaintiffs in enforcing national policy. TECA's thwarting Eastern's enforcement of the price regulations implementing the EPAA undermined Eastern's role and national policy. More egregiously, the

Court below short-circuited the regulatory plan by ignoring fundamental regulatory requirements.

The most important requirement of the regulations implementing the EPAA and its concern for minimizing the hardship of spiraling prices was the requirement that refiners could not recover more through increased prices than they had incurred in increased costs. The entire regulatory scheme revolved around that concept.[11]

As explained above, Atlantic Richfield broke the fundamental rule and recovered $26.9 million more than allowed. Simply put, that amount represents illegal profit made in the sale of refined petroleum products, including jet fuel, in less than one year. By limiting Eastern's recovery, TECA endorsed Atlantic Richfield's wrongdoing, minimizing the effectiveness of Eastern as a private plaintiff. Neither the endorsement nor the minimization should stand.

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[11] Much of the controversy in DOE enforcement of the regulations concerns the proper measurement of costs incurred and costs recovered through increased prices. The basic limitation is no longer an open issue; the only question is whether the limitation was complied with. *See, e.g., Standard Oil Co. v. Department of Energy*, 596 F.2d 1029 (TECA 1978).

CONCLUSION

This Court should provide firm guidance on the subject of prejudgment interest on amounts awarded private plaintiffs pursuant to the EPAA, as well as under other federal statutes. The recurring conflicts among the Courts of Appeals and the direct conflict between the decision of the Temporary Emergency Court of Appeals and the majority of the circuits should likewise be resolved.

Additionally, the Court needs to re-establish the role of the private plaintiff in enforcement of the price regulations, and overrule the holding of the Temporary Emergency Court of Appeals that has reduced the private plaintiff's role to its minimum for the benefit of those who have broken the law.

Respectfully submitted,

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August 17, 1983